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Anthony J. Passante Jr.

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Synopsis

RECENT DEVELOPMENTS IN THE IMMIGRATION LAWS OF THE UNITED STATES 1978-1979

INTRODUCTION

This Comment will focus on recent developments in the field of immigration law from October, 1978, to October, 1979. The discussion of the developments in the immigration laws will include selected legislative enactments and regulations promulgated pursuant to such enactments, important judicial decisions, significant administrative actions taken by the Immigration and Naturalization Service (INS) and the Board of Immigration Appeals (BIA), and proposed legislation. This Comment should serve as a brief summary of current events and as a guide to further research in the immigration laws of the United States.

UNITED STATES SUPREME COURT DECISIONS

Since October, 1978, the Supreme Court has rendered decisions in two cases¹ and denied certiorari in a third.² In *Ambach v. Norwick*,³ the Supreme Court upheld a New York statute forbidding the permanent certification as a public school teacher of any person who is not a United States citizen unless that person has

1. *Ambach v. Norwick*, 441 U.S. 68 (1979); *Califano v. Aznavorian*, 439 U.S. 170 (1978).

2. *Vergara v. Hampton*, 581 F.2d 1281 (7th Cir. 1978), *cert. denied*, 99 S. Ct. 1993 (1979).

3. 441 U.S. 68 (1979).

manifested an intention to apply for citizenship.⁴ Petitioners⁵ filed suit seeking to enjoin enforcement of the statute as violative of the fourteenth amendment's equal protection clause.⁶

In this five-to-four decision, the Court continued to read expansively the "governmental function" principle⁷ applied to New York State troopers in *Foley v. Connelie*.⁸ The "governmental function" principle requires that state legislation which discriminates on the basis of alienage be judged by the rational relationship test rather than by the close judicial scrutiny standard normally applied to such legislation.⁹ Because of the obligation of teachers to promote civic virtues and an understanding of the role of citizens in our society, the majority concluded that New York had a rational basis for limiting the participation of noncitizens in teaching in the public schools.¹⁰ Justice Blackmun, writing for the dissent, queried whether a good noncitizen teacher is better than a bad citizen teacher and whether it is preferable to have a teacher experienced in the culture and life of another country than one who has never seen another country.¹¹ The dissenters criticized the New York statute as drawing an irrational distinction, stating, "The State will know how to select its teachers responsibly, wholly apart from citizenship, and can do so selectively and intelligently. . . . An artificial citizenship bar is not a rational way."¹²

In a similar action, the Supreme Court, in *Vergara v. Hampton*,¹³ denied a petition for certiorari,¹⁴ which had asked the

4. N.Y. EDUC. LAW § 3001(3) (McKinney 1970).

5. Petitioner Norwick was a native of Scotland and a subject of Great Britain who was married to a U.S. citizen and had been a resident since 1965. Petitioner Dachinger was a Finnish subject who came to the U.S. in 1966 and was married to a U.S. citizen. Both teachers met all the educational requirements for certification as public school teachers prescribed by New York law and were eligible for naturalization, but they consistently refused to seek U.S. citizenship. 441 U.S. at 71.

6. *Id.*

7. As a general principle some state functions are so bound up with the operation of the State as a governmental entity as to permit exclusion from those functions of all persons who have not become part of the process of self-government. Accordingly, a State is required to justify its exclusion of aliens from such governmental positions only "by a showing of some rational relationship between the interest sought to be protected and the limiting classification."

Id. at 1590. See also *Foley v. Connelie*, 435 U.S. 291 (1978).

8. 435 U.S. 291 (1978).

9. *Id.* at 74.

10. 441 U.S. at 81.

11. *Id.* at 87. Justices Brennan, Marshall, and Stevens joined in the dissent.

12. *Id.* at 87-88.

13. 581 F.2d 1281 (7th Cir. 1978), *cert. denied*, 99 S. Ct. 1993 (1979).

14. The Supreme Court's denial of certiorari is not a judgment on the merits as an affirmance or a reversal would be, but it does end the question in the Seventh Circuit.

Court to review the decision of the Seventh Circuit Court of Appeals.¹⁵ That decision had sustained the validity of Executive Order No. 11935,¹⁶ which barred lawfully admitted permanent resident aliens from federal competitive civil service.¹⁷

The plaintiffs in *Vergara*¹⁸ filed a class action, challenging the Executive Order as exceeding the authority of the President. They also claimed the order was violative of their civil rights¹⁹ and a denial of due process. The district court denied class action status. The court of appeals found that the plaintiffs had established the prerequisites for a class action. However, the court dismissed the appeal holding that the President had not exceeded his authority, the Executive order did not violate plaintiffs' civil rights, and it did not deny them due process.²⁰

Another decision rendered by the Supreme Court is of far-reaching significance to both aliens and citizens. In *Califano v. Aznavorian*,²¹ the Court upheld the constitutionality of section 1611(f) of the Social Security Act, which precludes payment of Supplemental Security Income (SSI) benefits for any month

15. 581 F.2d 1281 (7th Cir. 1978), *cert. denied*, 441 U.S. 905 (1979).

16. 41 Fed. Reg. 37,301 (1976).

17. In *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976), the Supreme Court held that a United States Civil Service Commission regulation barring lawfully admitted permanent resident aliens from competitive civil service deprived them of an important liberty without due process of law. The decision was narrowly drawn, based on the lack of power in the Civil Service Commission, but assuming without deciding that the same bar would not be unconstitutional if imposed by Congress or the President. The President promptly issued Exec. Order No. 11935 on September 2, 1976, renewing the bar.

As justification for Exec. Order No. 11935, President Ford stated:

I have concluded that it is in the national interest to preserve the long-standing policy of generally prohibiting the employment of aliens from positions in the competitive service, except where the efficiency of the service or the national interest dictate otherwise in specific cases or circumstances. It is also my judgment that it would be detrimental to the efficiency of the civil service, as well as contrary to the national interest, precipitously to employ aliens in the competitive service without an appropriate determination that it is in the national interest to do so.

41 Fed. Reg. 37,301, 37,303 (1976).

18. The plaintiffs were three permanent resident aliens who desired to take civil service examinations for federal employment. 581 F.2d at 1282.

19. 42 U.S.C. § 1981 (1976). "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws"

20. 581 F.2d at 1281-82.

21. 439 U.S. 170 (1978).

which the recipient spends outside the United States.²²

The plaintiff, an American citizen eligible for SSI benefits, left the United States on July 21, 1974, and traveled to Mexico. Because of an unexpected illness, she remained in Mexico until September 21, 1974. Accordingly, she did not receive benefits for August or September. Asserting that the suspension of her benefits denied her due process, equal protection, and the right of international travel,²³ she sought declaratory relief as well as the benefits she had been denied because of her visit to Mexico.²⁴

The district court granted plaintiff summary judgment.²⁵ On appeal, the Supreme Court reversed, holding that section 1611(f) has only an incidental effect on international travel and clearly effectuates the basic congressional intention to limit SSI payments to residents of the United States.²⁶

EMPLOYMENT AND LABOR CERTIFICATIONS

Two major pieces of legislation have been enacted which affect the employment of aliens. The Comprehensive Employment and Training Act (CETA) Amendments of 1978²⁷ proscribe the use of CETA²⁸ funds for employment of certain aliens. The Outer Continental Shelf Lands Act (OCSLA) Amendments of 1978²⁹ reflect a growing public and congressional concern about the employment of undocumented aliens in drilling operations on the Outer Continental Shelf.

Several provisions of the CETA amendments are of special interest. The amendments limit the use of CETA funds to "citizens and nationals of the United States, lawfully admitted permanent resident aliens, and lawfully admitted refugees and parolees."³⁰ Use of funds for the employment of any other persons is expressly prohibited.³¹ The amendments also limit membership in the Young Adult Conservation Corps to citizens or lawfully admitted permanent residents of the United States or lawfully ad-

22. 42 U.S.C. § 1382(f) (1976).

23. 439 U.S. at 172.

24. *Id.* at 172-73.

25. 440 F. Supp. 788, 797 (S.D. Cal. 1977), *rev'd*, 439 U.S. 170 (1978).

26. 439 U.S. 170 (1978). The Court stated, "While these justifications for the legislation may not be compelling, its constitutionality, in contrast to the standards applied to laws that penalize the right of interstate travel, does not depend on compelling justifications." *Id.* at 174.

27. Pub. L. No. 95-524, 92 Stat. 1909 (1978).

28. Comprehensive Employment and Training Act of 1973, 29 U.S.C. §§ 801-992 (1976).

29. Pub. L. No. 95-372, 92 Stat. 629 (1978).

30. CETA Amendments § 132(e), 29 U.S.C.A. § 834(e) (West Supp. 1979).

31. *Id.* § 121(p), 29 U.S.C.A. § 823(p) (West Supp. 1979).

mitted refugees and parolees.³²

The pertinent provision of the OSCLA amendments directs the Secretary of Transportation to develop regulations which require that "any vessel . . . or other vehicle . . . be manned or crewed . . . by citizens of the United States or aliens lawfully admitted for permanent residence."³³ However, if there are not sufficient numbers of citizens or aliens lawfully admitted for permanent residence who are qualified and available for such work³⁴ or if citizens of a foreign country have a right to control or own over fifty percent of the equipment, an exemption from the citizenship or permanent residency requirement is available.³⁵

A number of bills relating to the employment of aliens have been introduced in the Congress. Several bills attempt to facilitate the admission of aliens for temporary employment as a way to stem the tide of illegal entries.³⁶ Other proposals seek amendments to the Internal Revenue Code which would disallow deductions from gross income for salary paid to aliens illegally employed in the United States.³⁷ Two significant proposals attempt to impose criminal penalties on those who employ illegal aliens.³⁸ These congressional attempts to legislate against the employment of illegal aliens are particularly important. Previous attempts to enact legislation penalizing the employers of illegal aliens not authorized to work have failed.³⁹ Currently, an alien who engages in unauthorized employment does not commit a criminal offense and the employer of the alien is not in violation

32. *Id.* § 803(b)(1)(C), 29 U.S.C.A. § 993(b)(1)(C) (West Supp. 1979).

33. OSCLA Amendments § 30(a)(3), 43 U.S.C.A. § 1356(a)(3) (West Supp. 1979).

34. *Id.* § 30(c)(1), 43 U.S.C.A. § 1356(c)(1) (West Supp. 1979).

35. *Id.* § 30(c)(2), 43 U.S.C.A. § 1356(c)(2) (West Supp. 1979).

36. H.R. 326, 96th Cong., 1st Sess., 125 CONG. REC. H165 (daily ed. Jan. 18, 1979); H.R. 405, 96th Cong., 1st Sess., 125 CONG. REC. H167 (daily ed. Jan. 18, 1979); H.R. 800, 96th Cong., 1st Sess., 125 CONG. REC. H179 (daily ed. Jan. 18, 1979); H.R. 2213, 96th Cong., 1st Sess., 125 CONG. REC. H692 (daily ed. Feb. 15, 1979).

37. H.R. 244, 96th Cong., 1st Sess., 125 CONG. REC. H163 (daily ed. Jan. 18, 1979); H.R. 2214, 96th Cong., 1st Sess., 125 CONG. REC. H692 (daily ed. Feb. 15, 1979).

38. H.R. 225, 96th Cong., 1st Sess., 125 CONG. REC. H163 (daily ed. Jan. 18, 1979); H.R. 1517, 96th Cong., 1st Sess., 125 CONG. REC. H316 (daily ed. Jan. 25, 1979).

39. H.R. 16188, 92d Cong., 2d Sess., 118 CONG. REC. 28, 972 (1972); H.R. 982, 94th Cong., 1st Sess., 121 CONG. REC. 504 (1975); S. 3074, 94th Cong., 2d Sess., 122 CONG. REC. 5360 (1976). However, 7 U.S.C. § 2045(f) (1976) prohibits labor contractors from knowingly recruiting aliens who are not lawful permanent residents or who have not been authorized by the Attorney General to accept employment. (Subsection (f) added by Pub. L. No. 93-518, § 11(a), 88 Stat. 1655 (1974)).

of federal law.⁴⁰

Numerous decisions have been rendered in the area of employment and labor certifications by the federal courts, the INS and BIA, and the Department of Labor.⁴¹ Three federal court decisions are of particular importance.⁴²

In *Mukadam v. United States Department of Labor*,⁴³ the District Court for the Southern District of New York rejected the government's contention that an alien who is an unsuccessful applicant for labor certification lacks standing to sue for judicial review of that determination. The government asserted that only the prospective employer has standing to sue.⁴⁴

The court held that the government's analysis of section 212(a)(14) of the Immigration and Nationality Act (INA) was unduly narrow. When Mukadam filed his application for certification, the INA permitted aliens residing in the United States to apply for third preference status (which requires certification) without a specific offer of employment.⁴⁵ The court determined that at that time "Congress did intend to confer directly on aliens the right to seek permanent residence without the intercession of an employer." Thus, it "would be inconsistent with this intent to limit judicial review of a denial of certification to aliens whose petitions are joined in by an employer when denial of certification forecloses an alien from seeking a third preference visa."⁴⁶

In *Spyropoulos v. INS*,⁴⁷ the Court of Appeals for the First Circuit made an important distinction between an alien's representations at entry respecting his job qualifications and his representations at entry respecting his intent to take up certified

40. See Bersen, *Employment Rights of Aliens Under the Immigration Laws*, reprinted in 56 INTERPRETER RELEASES 240 (1979).

41. The Department of Labor issues administrative decisions on labor certifications brought before it by aliens seeking employment. Because of the large number of decisions rendered in the past year, a discussion of these decisions will not be presented. For digests of the most significant of these decisions, see 56 INTERPRETER RELEASES 48, 311 (1979). See also 56 INTERPRETER RELEASES 321 (1979) (proposed revisions of the regulations governing the labor certification process).

42. Yui Sing Tse v. INS, 596 F.2d 831 (9th Cir. 1979); Spyropoulos v. INS, 590 F.2d 1 (1st Cir. 1978); Mukadam v. United States Dep't of Labor, 458 F. Supp. 164 (S.D.N.Y. 1978).

43. 458 F. Supp. 164 (S.D.N.Y. 1978). The plaintiff, an alien in the U.S. as a non-immigrant, was seeking third preference status as a member of the professions (food chemist). His labor certification application, filed in his own behalf in 1975, was ultimately denied on the ground that U.S. workers were available. He filed an action in the district court to set aside the denial as an abuse of discretion.

44. *Id.* at 167.

45. INA, § 203(a), as amended by Act of October 20, 1976, Pub. L. No. 94-571, § 4, 90 Stat. 2705.

46. 458 F. Supp. at 167.

47. 590 F.2d 1 (1st Cir. 1978).

employment. Petitioner, a Canadian citizen, received a job offer to work in Washington, D.C., as a cabinetmaker. On this basis a labor certification was issued. The United States Consul issued an immigrant visa to petitioner despite the fact that he failed to bring a letter from his prospective employer indicating that the job was still available. Petitioner immediately proceeded to Massachusetts where he took employment as a woodworker and a machinist.⁴⁸

Deportation procedures were initiated charging that petitioner was deportable under section 241(a)(1) of the INA⁴⁹ because he was inadmissible at entry under section 212(a)(14).⁵⁰ Both the immigration judge and the BIA found petitioner deportable.⁵¹

On appeal, petitioner contended that the finding of deportability amounted to a collateral attack on the validity of the labor certification, which is beyond the power of the INS unless included in a fraud charge under section 212(a)(19).⁵² The court disagreed, stating that the validity of the labor certification was not in issue. The court found that petitioner may have had a valid certificate for a job in Washington, D.C., but the evidence indicated that he did not intend to take the job. Therefore, he entered to do uncertified labor, and a decision that he was deportable in no way impugns the Secretary of Labor's decision to certify him for work in Washington.⁵³

The Ninth Circuit Court of Appeals in *Yui Sing Tse v. INS*⁵⁴ held that a labor certification as a Chinese specialty cook is valid for adjustment of status purposes if both the employer and the alien contemplate, at the time of the certification, a continuing

48. *Id.* at 2.

49. 8 U.S.C. § 1251(a)(1) (1976).

50. *Id.* § 1182(a)(14).

51. Both found that petitioner knew or should have known that there were problems with his certified job, that he failed to take reasonable steps to determine whether or not the certified job was still available, and that he almost immediately took up uncertified employment. The BIA found that these facts amounted to clear, convincing, and unequivocal evidence that he entered to perform uncertified labor. 590 F.2d 1 (1st Cir. 1978).

52. 8 U.S.C. § 1182(a)(19) (1976). See also *Casteneda-Gonzalez v. INS*, 564 F.2d 417 (D.C. Cir. 1977).

53. 590 F.2d at 3-4.

54. 596 F.2d 831 (9th Cir. 1979). By way of dictum, the court indicated that the labor certification was still valid, even though the alien had changed employment in the interim. The certified job was being held open and the alien and the certified employer both intended that the alien would return to the certified employment prior to or upon grant of adjustment of status. *Id.* at 833 nn. 2 & 3.

employer-employee relationship, notwithstanding the alien's intent to ultimately practice dentistry.⁵⁵ The immigration judge denied adjustment because the petitioner was no longer working for the certified employer. On appeal the BIA affirmed, but on the ground that the petitioner was ineligible because he planned to become a dentist rather than to continue as a cook.⁵⁶

The court of appeals reversed. The court found that it may be appropriate to require that the alien intend to occupy the certificated occupation for a period of time that is reasonable in light both of the interest served by the regulation⁵⁷ and the interest in freedom to change employment. However, the regulation cannot be construed to limit the freedom to strive for self-improvement. The court held that the regulation requires only that, at the time of entry, both the employer and the employee intend that the latter will be employed in the job upon which the labor certification is based. That condition was satisfied in this case.⁵⁸

EXPATRIATION AND NATIONALITY

Major legislation on expatriation and nationality became law on October 10, 1978. The new law⁵⁹ repeals certain expatriation sections of the INA which have been declared unconstitutional or whose application has been severely limited by Supreme Court decisions.⁶⁰

Children born abroad to parents, one of whom is a United States citizen and the other an alien, are no longer required to be physically present in the United States for two years between the ages of fourteen and eighteen, in order to retain the United States citizenship acquired at birth.⁶¹ This retention of citizenship provision is also no longer applicable to United States citizen children born abroad of mixed parentage who acquired their citizenship under prior statutes.⁶² The residency requirements for retention of citizenship by dual nationals living abroad were also repealed.⁶³ Other provisions of the INA which were repealed required expatriation of the following: citizens who vote in a

55. *Id.* at 835.

56. *Id.* at 833 & n.3.

57. 8 C.F.R. § 204.4(b) (1979).

58. 596 F.2d at 835.

59. Pub. L. No. 95-432, 92 Stat. 1046 (1978).

60. [1978] U.S. CODE CONG. & AD. NEWS 2521.

61. INA, Pub. L. No. 95-432, § 1, 92 Stat. 1046 (1978). [1978] U.S. CODE CONG. & AD. NEWS 2522-24.

62. INA, Pub. L. No. 95-432, § 1, 92 Stat. 1046 (1978). [1978] U.S. CODE CONG. & AD. NEWS 2522-24.

63. INA, Pub. L. No. 95-432, § 1, 92 Stat. 1046 (1978). [1978] U.S. CODE CONG. & AD. NEWS 2522-24.

foreign political election,⁶⁴ soldiers who are convicted of desertion in time of war by court martial,⁶⁵ and naturalized citizens residing abroad.⁶⁶

The Supreme Court has granted certiorari in the expatriation case of *Terrazas v. Vance*.⁶⁷ In *Terrazas*, the Court of Appeals for the Seventh Circuit held that if the government asserts that expatriation has occurred, it has the burden of proving by clear, convincing, and unequivocal evidence not only that the expatriating act took place, but also that it was performed voluntarily.⁶⁸ In so holding, the court struck down as unconstitutional under the fourteenth amendment the provision of section 349(c) of the INA which requires proof of the expatriating act by a preponderance of the evidence and presumes that the citizen acted voluntarily unless he can prove by a preponderance of the evidence that his actions were involuntary.⁶⁹ The court relied on *Afroyim v. Rusk*,⁷⁰ which held that the fourteenth amendment protects every United States citizen against congressional forcible destruction of his citizenship.

VISA PREFERENCES

Two major pieces of legislation that were passed by Congress and signed into law by the President affect the policy of the United States governing visa preferences. Congress enacted Public Law No. 95-412⁷¹ on October 5, 1978,⁷² establishing a new

64. INA, Pub. L. No. 95-432, § 2, 92 Stat. 1046 (1978). [1978] U.S. CODE CONG. & AD. NEWS 2525. See also *Afroyim v. Rusk*, 387 U.S. 253 (1967) (declared § 349(a)(5) of the INA unconstitutional).

65. INA, Pub. L. No. 95-432, § 2, 92 Stat. 1046 (1978). [1978] U.S. CODE CONG. & AD. NEWS 2525. See also *Trop v. Dulles*, 356 U.S. 86 (1958) (declared § 349(a)(8) of the INA unconstitutional).

66. INA, Pub. L. No. 95-432, § 2, 92 Stat. 1046 (1978). [1978] U.S. CODE CONG. & AD. NEWS 2525. See also *Schneider v. Rusk*, 377 U.S. 163 (1964) (declared § 352 of the INA unconstitutional).

67. 577 F.2d 7 (7th Cir. 1978), *prob. juris. noted*, 442 U.S. 927 (1979). The case will not be scheduled for oral argument until sometime during the 1979 term, which begins in October. If the Supreme Court agrees with the decision below and it is given retroactive effect, the validity of thousands of past administrative determinations of loss of nationality could be open to challenge.

68. *Id.*

69. 8 U.S.C. § 1481(c) (1976).

70. 387 U.S. 253 (1967).

71. 92 Stat. 907 (1978).

72. Because the Act contained no delayed effective date, it went into effect immediately upon being signed by the President on October 4, 1978. Sponsors of the Act had hoped to have it effective prior to September 30, 1978, the end of the fiscal

worldwide immigration ceiling of 290,000 persons. The former worldwide immigration ceiling was broken up into an Eastern Hemisphere limitation of 170,000 and a Western Hemisphere limitation of 120,000.⁷³ The other significant provision of the Act establishes a Select Commission on Immigration and Refugee Policy.⁷⁴ The Commission will study and evaluate existing laws, policies, and procedures governing the admission of immigrants and refugees to the United States and will make appropriate recommendations to Congress and the President.⁷⁵

Recently proposed legislation contains sections which, if passed, would modify the new law on visa preferences. The Administration's refugee bill, which has been introduced in both the House and the Senate, would reduce the worldwide immigration ceiling, exclusive of refugees, to 270,000 annually. Included in this proposal, however, are provisions to accept as many as 50,000 refugees annually, thus raising the total number of immigrants admitted into the United States to 320,000 annually.⁷⁶

The second legislative enactment⁷⁷ requires a valid adoption home-study before granting a nonpreference visa for children adopted abroad or coming to the United States for adoption by United States citizens.⁷⁸ A valid adoption home-study must also be performed before granting an immediate relative immigrant visa for an adopted child or a child coming for adoption as defined in section 101(b)(1)(F) of the INA.⁷⁹ The Act also proscribes the issuance of a nonpreference visa to an unmarried child under sixteen, unless that child is accompanied by or following his natural

year, in order to free up some 8,000 refugee numbers as an emergency measure for use by "Boat People" refugees from Indochina. 56 INTERPRETER RELEASES 296 (1979).

73. 8 U.S.C.A. § 1151(a) (West Supp. 1979). Sections 2 and 3 of the Act, *id.* § 1152(c), remove references to separate quotas in §§ 202(c) and 203(a) of the INA. See also H.R. REP. NO. 1206, 95th Cong., 2d Sess. 1-2, reprinted in [1978] U.S. CODE CONG. & AD. NEWS 2261-62. Section 5 of the Act, 8 U.S.C.A. § 1182 (West Supp. 1979), provides that any refugee, not otherwise eligible for retroactive adjustment of status, who was or is paroled in under § 212(d)(5) of the INA prior to September 30, 1980, shall have his status adjusted pursuant to the provisions of § 203(g) and (h). Since (g) and (h) contain no provision for a charge to a quota, this provision will enable refugee parolees already here and those refugees who will be paroled prior to September 30, 1980, to become permanent residents without charge to the worldwide limitation.

74. Pub. L. No. 95-412, § 4, 92 Stat. 907 (1978).

75. *Id.* § 4(c), 92 Stat. 907.

76. S. 643, 96th Cong., 1st Sess., 125 CONG. REC. 2630 (1979); H.R. 2816, 96th Cong., 1st Sess., 125 CONG. REC. 1326 (1979).

77. Pub. L. No. 95-417, 92 Stat. 917 (1978). Regulations promulgated pursuant to Pub. L. No. 95-417 may be found at 44 Fed. Reg. 5059 (1979).

78. 8 U.S.C.A. § 1153(a)(8)(A) (West Supp. 1979).

79. *Id.* § 1154(e).

parent.⁸⁰ The measure removes the limitation of two petitions per family to grant immigration benefits to alien adopted children, now contained in section 204(c) of the INA.⁸¹ Other sections of this new law deal with the naturalization of adopted children and will be discussed in the next section.

NATURALIZATION AND DENATURALIZATION

The naturalization laws pertaining to the naturalization of adopted children and the English language requirement for the naturalization of certain persons have been legislatively modified. Public Law No. 95-417⁸² liberalizes the requirements for naturalization of adopted children. The age under which an alien child can derive citizenship through the naturalization of his parent or parents was raised from sixteen to eighteen years of age.⁸³ Adopted children also are now eligible for derivative citizenship.⁸⁴ The two-year United States residence and one-year United States physical presence requirements for adopted children have been eliminated.⁸⁵

Public Law No. 95-579⁸⁶ waives the English language requirement of section 312 of the INA in the special situation of an alien who, on the date of filing his naturalization petition, is over fifty years of age and has been living in the United States for periods totalling twenty years following a lawful admission for permanent residence.⁸⁷ Prior to this amendment, the English language requirement was waived only for aliens over the age of fifty on the effective date of the INA (December 24, 1952).⁸⁸ Thus, an alien would have to have been at least seventy-five years of age in order to have the English language requirement waived.

Three particularly noteworthy cases were decided in the past

80. *Id.* § 1153(a)(8)(B). This latter provision cuts off an avenue of immigration for alien children under 16 who cannot qualify for immediate relative or preference status; e.g., a child coming to the United States to live with an uncle. Such a child did not need a labor certification and was able to qualify for a nonpreference visa when the preference portion of the quota was open.

81. *Id.* § 1154(c).

82. *See* note 77 *supra*.

83. *Id.* §§ 1431(a)(1), (2), 1432(a)(4), (5).

84. *Id.*

85. *Id.* § 1434 (repealing 8 U.S.C. § 1434 (1976)).

86. 92 Stat. 2474 (1978).

87. [1978] U.S. CODE CONG. & AD. NEWS 5549.

88. *Id.* at 5550.

year. In *In re Carelli*,⁸⁹ the District Court for the Eastern District of New York granted naturalization over objection by the naturalization examiner. The examiner claimed petitioner was disqualified under section 315 of the INA⁹⁰ as one who had applied for and had been relieved from military service on the ground of alienage.⁹¹

Petitioner was admitted to the United States and registered with the Selective Service in 1960. On February 26, 1970, he received a notice for induction but filed a request for relief from training and service and the induction notice was cancelled. On February 24, 1972, he received a IV-C classification as a permanent resident alien exempt from military service. It was during the time prior to his reclassification that the government introduced the lottery system.⁹²

The naturalization examiner maintained that the citizenship bar of section 315 became effective when the government reclassified petitioner IV-C. The court disagreed, however, stating the fact that an alien who has requested an exemption from service is at some point given a IV-C classification does not necessarily establish that the government has fully complied with its part of the statutory bargain. "To determine whether the government has performed its part of the agreement one must look at the circumstances under which the IV-C exemption was granted in a particular case."⁹³ Upon examining the record, the court concluded that in view of the drastic change in circumstances (introduction of the lottery system), the court would be hard pressed to find that the grant of permanent exemption from military service to petitioner about two years after his initial request for exemption represented reasonably prompt performance by the government of its part of the statutory bargain.⁹⁴

In *United States v. Walus*,⁹⁵ the District Court for the Northern District of Illinois revoked defendant's naturalization on the basis of defendant's concealed criminal activities as a member of the Gestapo during World War II. The government filed the denaturalization complaint in 1976 charging that Walus' United States citizenship was illegally procured because obtained by conceal-

89. 466 F. Supp. 272 (E.D.N.Y. 1979).

90. 8 U.S.C. § 1426 (1976).

91. 466 F. Supp. at 272.

92. *Id.* at 274.

93. *Id.* at 276.

94. *Id.* at 277. See S. 1217, 96th Cong., 1st Sess., 125 CONG. REC. 8420 (daily ed. Sept. 24, 1979). This proposal would amend the INA and renders aliens who have been relieved of U.S. military service obligation eligible for citizenship if their military exemption was pursuant to a treaty or other international agreement.

95. 453 F. Supp. 699 (N.D. Ill. 1978).

ment of material facts and willful misrepresentation and because Walus lacked the good moral character required for United States citizenship.⁹⁶

Walus asserted the statute of limitations as an affirmative defense, denied all the allegations in the complaint, and demanded a jury trial. He claimed that the Nazis had arrested him at the age of seventeen and forced him into labor on various farms.⁹⁷

The court rejected Walus' arguments, holding that because a denaturalization proceeding is an equitable and not a legal one, there is no right to a jury trial.⁹⁸ The court further stated that there was no applicable statute of limitations in this situation because, under section 340 of the INA, citizenship illegally obtained is void at its inception.⁹⁹ Based on the evidence presented, the court rejected Walus' defense of coercion as a weak alibi and revoked his naturalization.¹⁰⁰

In a similar case, *United States v. Fedorenko*,¹⁰¹ the government filed a denaturalization complaint against the defendant, charging that his naturalization was procured illegally and by willful misrepresentations and concealment of material facts. The defendant admitted that on his visa application he failed to reveal his service as a concentration camp guard during the war. A Foreign Service officer testified that if the defendant had revealed his concentration camp position the visa would not have been issued but further investigation would have been needed to determine his admissibility.¹⁰²

The district court entered judgment for the defendant, finding that defendant had not voluntarily served as a concentration camp guard.¹⁰³ The court concluded that the misstatements in the visa application had not been shown to be material under the criteria laid down in *Chaunt v. United States*.¹⁰⁴ Thus, adhering to the interpretation adopted by the Third and Ninth Circuits, the court held that a suppressed fact is material only if the truth

96. *Id.* at 700-01.

97. *Id.* at 702.

98. *Id.*

99. *Id.* at 716.

100. *Id.* at 703-16.

101. 597 F.2d 946 (5th Cir. 1979).

102. *Id.*

103. *United States v. Fedorenko*, 455 F. Supp. 893, 913-14 (S.D. Fla. 1978), *rev'd*, 597 F.2d 946 (5th Cir. 1979).

104. 364 U.S. 350 (1960).

would have justified denial.¹⁰⁵

The Court of Appeals for the Fifth Circuit reversed, holding that the district court had misconstrued the *Chaunt* test of materiality.¹⁰⁶ In *Chaunt*, the Supreme Court had held that a misrepresentation or concealment was material only if the government proved "either (1) that facts were suppressed which, if known, would have warranted denial of citizenship or (2) that their disclosure might have been useful in an investigation possibly leading to the discovery of other facts warranting denial of citizenship."¹⁰⁷ The court concluded that the evidence, although insufficient to satisfy the first *Chaunt* test, was adequate under the second because if the defendant had disclosed his guard service, the authorities would have conducted an inquiry that might have resulted in denial of a visa.¹⁰⁸

FOREIGN INVESTMENTS IN AGRICULTURE

In order to keep a watchful eye on the growing number of alien investors in United States agricultural land, Public Law No. 95-460¹⁰⁹ was approved. This new Act requires any foreign person who acquires or transfers any interest, other than a security interest, in agricultural land to submit a report to the Secretary of Agriculture within ninety days after acquisition or transfer of the land.¹¹⁰ Civil penalties will be imposed for failure to submit a report or for proffering false information in a report.¹¹¹ The Act requires the Secretary of Agriculture to formulate and submit reports to the President, the Congress, and the states. These reports will analyze the effects, particularly on family farms and rural communities, of such transactions and holdings.¹¹²

105. 455 F. Supp. at 915-16.

106. 597 F.2d at 951.

107. 364 U.S. at 355.

108. 597 F.2d at 953.

109. 92 Stat. 1263 (1978). See S. 194, 96th Cong., 1st Sess., 125 CONG. REC. 435 (1979). This proposal, submitted by Senator McGovern, seeks to regulate and control the acquisition of United States agricultural land by foreign persons. This proposal would seem to indicate a fear that if too much agricultural land is acquired by foreign investors, the country could be faced with a dependence on foreigners for food as well as for oil. See also H.R. 3182, 96th Cong., 1st Sess., 125 CONG. REC. 1642 (1979). This proposal would amend the Securities and Exchange Act of 1934 to restrict persons who are not citizens of the U.S. from acquiring more than 35% of the nonvoting securities or more than 5% of the voting securities of any issuer whose securities are registered under the Act.

110. 7 U.S.C.A. § 3501(a) (West Supp. 1979).

111. *Id.* § 3502.

112. *Id.* § 3504.

FAMILY RELATIONS

Illegitimate Child as Stepchild

In a landmark decision, *In re Moreira*,¹¹³ the BIA has laid down new criteria for determining whether a visa petitioner or beneficiary qualifies as a "stepchild" within the meaning of section 101(b)(1)(B).¹¹⁴ In *Moreira*, the BIA refused to accept as a rule of general applicability the holding of *Andrade v. Esperdy*,¹¹⁵ as suggested by both petitioner and the INS.¹¹⁶ *Andrade* held that a visa petition by the spouse of the natural father of an illegitimate child on behalf of that child or stepchild can be approved even in the absence of a showing that they had all lived together in a close family unit.¹¹⁷

The problem arose because under section 101 (b)(1)(D) of the INA, an illegitimate child can claim or confer immigration benefits only in relation to its natural mother and not in relation to its natural father.¹¹⁸ The District Court for the Southern District of New York, in *Nation v. Esperdy*,¹¹⁹ fashioned a remedy by recognizing the spouse of the natural father of the illegitimate child as the child's stepmother, if the three had lived together as a close family unit.¹²⁰ The same court in *Andrade v. Esperdy*¹²¹ extended the *Nation* rule to a situation in which there had never been a close family unit. However, the BIA had refused to apply that holding in cases outside the jurisdiction of the court that had rendered

113. I.D. No. 2720 (1979).

114. 8 U.S.C. § 1101(b)(1)(B) (1976).

115. 270 F. Supp. 516 (S.D.N.Y. 1967).

116. In the *Moreira* case, the District Director in Philadelphia had denied the visa petition on a finding that the beneficiary was illegitimate and that the petitioner and her husband, the child's natural father, had never lived together with the child in a close family unit as required by the BIA precedent decisions. On petitioner's appeal, the INS, in a memorandum dated December 11, 1978, recommended that the *Andrade* rule be applied nationwide. In a brief order dated January 5, 1979, in which it did not specifically accept the new position taken by the INS, the BIA remanded to the District Director. The INS, joined by petitioner, moved for reconsideration asking the BIA to overrule its prior precedents and accept the *Andrade* holding that a close family unit need not be shown.

117. 270 F. Supp. 516 (S.D.N.Y. 1967).

118. 8 U.S.C. § 1101(b)(1)(D) (1976). This discrimination was sanctioned in *Fiallo v. Bell*, 430 U.S. 787, 798-99 (1977).

119. 239 F. Supp. 531 (S.D.N.Y. 1965).

120. *Id.*

121. 270 F. Supp. 516 (S.D.N.Y. 1967).

it.¹²² None of the decisions refusing to follow *Andrade* appear to have been challenged in court until *Hyppolite v. Sweeney*,¹²³ in which the District Court for the Southern District of Florida endorsed the *Andrade* holding.

In the *Moreira* opinion, the BIA reemphasized the need for a showing of an actual parent-child relationship and agreed that such a relationship can exist even though the parties may not have actually lived together as a family unit. On the other hand, something more than the mere marriage of the spouse to the child's actual parent must be shown, and this applies if the child is born in wedlock as well as if the child is illegitimate at birth.¹²⁴ Specifically, the BIA held that a step-relationship will be recognized for immigration purposes only if the stepparent has shown an interest in the stepchild's welfare prior to the child's eighteenth birthday, either by permitting the child to live in the family home and caring for him as a parent would or, if the child did not live with the stepparent, by demonstrating an active parental interest in the child's support, instruction, and general welfare.¹²⁵

Validity of Marriages

Two recent cases have clarified standards for determining the validity of marriages for immigration purposes. In *Hendrix v. U.S.I.N.S.*,¹²⁶ petitioner was admitted to the United States for permanent residence as the unmarried daughter of a United States

122. *In re Harris*, I.D. No. 2308 (1970); *In re Amado and Monteiro*, 13 I. & N. Dec. 179 (1969); *In re Soares*, 12 I. & N. Dec. 653 (1968).

123. —F. Supp. —, (S.D. Fla., No. 77-1865-Civ. WMH, filed Jan. 6, 1979), *digested in* 56 INTERPRETER RELEASES 62 (1979).

124. I.D. No. 2720, at 6 (1979).

125. *Id.* at 7.

Several other Board decisions require clarification in light of today's decision. In *Matter of Ferreira*, Interim Decision 2645 (BIA 1978), *Matter of Gur*, Interim Decision 2560 (BIA 1977), and *Matter of Heung*, Interim Decision 2334 (BIA 1974), visa petitions were filed on behalf of siblings, and approval was sought on the basis of a common stepparent. In these cases the child needing the stepparent in order to create the sibling relationship was legitimate. We therefore approved each visa petition, without inquiry into whether or not a close family unit has been established. This approach, insofar as it made a distinction between legitimate and illegitimate stepchildren, was inconsistent with the express terms of the statute, which speaks of, "a stepchild, whether or not born out of wedlock." Section 101(b)(1)(B) of the Act. We hold that, in order for a steprelationship to be established, there must be a showing that the child, whether legitimate or illegitimate, lived with and was cared for as the child of the stepparent, or that the stepparent otherwise evinced an active parental interest in the support, instruction and general welfare of the child. To the extent that the *Ferreira*, *Gur*, and *Heung* decisions indicate otherwise with regard to legitimate stepchildren, they are hereby modified.

Id. at 9.

126. 583 F.2d 1102 (9th Cir. 1978).

citizen. At that time, however, she was married to a citizen of the Philippines. She was subsequently ordered deported because at the time of her entry she was not of the status specified in her immigrant visa.¹²⁷ She obtained an annulment of the marriage and on appeal to the BIA argued that, in light of the annulment, she was not a married person at the time of entry and was, therefore, properly admitted. The BIA rejected her appeal. The Court of Appeals for the Ninth Circuit affirmed the BIA decision, refusing to give retroactive effect to the annulment order.¹²⁸

In the second case, *Chan v. Bell*,¹²⁹ the District of Columbia District Court held that a marriage valid at its inception and entered into in good faith is sufficient for visa petition purposes, notwithstanding an INS conclusion that it is no longer viable. The District Director had denied an immediate relative visa petition because plaintiffs ceased living together as husband and wife after the visa petition had been filed. An appeal to the BIA was dismissed.¹³⁰

The circuit court reversed, holding that section 201 (b)¹³¹ and 204(b)¹³² of the INA were not discretionary and once petitioner establishes status the benefits are awarded by law.¹³³ The court disagreed with the Service's contention that a marriage must be viable not only when the visa petition is filed but also when the Service renders its decision. The court held that the regulations do not require the existence of a "viable" marriage as a precondition to a grant of immediate relative status.¹³⁴ The court pointed out that there is no prescribed time limit within which the Service must take final action on a visa petition.¹³⁵ In this case more than

127. See 8 U.S.C. § 1251(a)(1) (1976).

128. 583 F.2d at 1103-04. The court also refused to apply the sham marriage doctrine because applying it to petitioner's situation would result in manipulation of the immigration laws, which the doctrine seeks to prevent.

129. 464 F. Supp. 125 (D.D.C. 1978).

130. *Id.* at 126-27.

131. 8 U.S.C. § 1151(b) (1976). "The immediate relatives referred to in subsection (a) of this section shall mean the children, spouses and parents of a citizen of the United States. . . ."

132. *Id.* § 1154(b). This section provides for investigation by the Attorney General and approval of the visa petition if he finds the facts stated in the petition to be true.

133. 464 F. Supp. at 128 & n. 7.

134. *Id.* at 128-30. 8 C.F.R. § 204.2(c)(2) (1979) requires that a petition for classification to immediate relative status be accompanied only by a certificate of marriage and proof of the legal termination of all previous marriages.

135. 464 F. Supp. at 132.

thirty months had elapsed between the filing of the petition and the final administrative ruling.¹³⁶

In addition, the construction proposed would have vested in the Service an unreasonably wide and essentially unreviewable discretion to determine which marriages are viable.¹³⁷

STUDENT VISAS

Important changes in the immigration regulations concerning students became effective on January 1, 1979.¹³⁸ Under the new regulations, nonimmigrant students will be admitted for the duration of their status as students.¹³⁹ This will eliminate the need for nonimmigrant students to apply each year for extension of stay. Nonimmigrant students presently in the United States will be granted duration of status upon application for extension of stay if anticipated schooling will require more than one year to complete.¹⁴⁰

The new regulations also govern nonimmigrant students seeking to qualify for off-campus employment by establishing the following prerequisites:

- (1) The student is in good standing as a student carrying a full course of study;
- (2) the student has demonstrated economic necessity due to unforeseen circumstances arising subsequent to entry;
- (3) the student has demonstrated that acceptance of employment will not interfere with his or her studies;
- (4) the student has agreed that employment while school is in session will not exceed 20 hours per week; and
- (5) the student has submitted to an authorized official of the school the proper form.¹⁴¹

The Service hopes that the new regulations will facilitate the admission of nonimmigrant students and reduce the Service's adjudicative workload, while providing adequate immigration controls of persons in the United States on student visas.¹⁴²

In *Mashi v. INS*,¹⁴³ the Court of Appeals for the Fifth Circuit laid down a number of important rulings which will be helpful in applying the law relating to maintenance of status by nonimmigrant students. *Mashi* involved a native and citizen of Iran who was admitted to the United States as a nonimmigrant student in 1975. Midway through the fall, 1975, semester, he participated in a political demonstration and was arrested for demonstrating without a permit. The arrest culminated in a twelve-day incarceration

136. *Id.* at 127.

137. *Id.* at 132.

138. 43 Fed. Reg. 54,618 (1978).

139. 8 C.F.R. § 214.2(f)(2) (1979).

140. *Id.* § 214.2(f)(5).

141. *Id.* § 214.2(f)(6).

142. See note 138 *supra*.

143. 585 F.2d 1309 (5th Cir. 1978).

pursuant to an INS "hold order." Because of a large number of absences, petitioner voluntarily withdrew from one of his courses upon his return to school.¹⁴⁴ The INS promptly initiated deportation proceedings under section 241 (a)(9) of the INA,¹⁴⁵ charging that he had failed to pursue a full course of study. By completing only ten units of the fall semester, it was alleged, he was not meeting the twelve-hour minimum course load required by the *Code of Federal Regulations*.¹⁴⁶ The immigration judge found him deportable and granted voluntary departure. The BIA affirmed.¹⁴⁷

The court of appeals reversed, pointing out that the twelve-credit rule was added by amendment in 1975 and does not apply to aliens such as petitioner, who were admitted as nonimmigrant students before January 1, 1976. As to such students, the regulations require merely that they continue to carry not less than what the school considers to be a full course of study and otherwise continue to maintain student status.¹⁴⁸ The school never reported, as required under the regulations, that the petitioner failed to carry a full course of study or failed to attend classes to the extent normally required. The court concluded, therefore, that petitioner had otherwise maintained his student status by completing twenty-nine units in two semesters plus two sessions of summer school.¹⁴⁹

The court was critical of the BIA's interpretation that the regulation required deportation solely because the petitioner had dropped the course before the end of the semester to avoid a failing grade. The petitioner would not have been deportable if he had continued with the course futilely to the end.¹⁵⁰ Also criticized was the INS "hold order," which led to the incarceration that the BIA held was "meaningfully disruptive of the pursuit of petitioner's academic studies."¹⁵¹ The court noted that in one of the Board's own decisions, *Neeley v. Whyllie*,¹⁵² the Board held that:

144. *Id.* at 1311.

145. 8 U.S.C. § 1251(a)(9) (1976).

146. 8 C.F.R. § 214.2(f)(1)(a) (1979).

147. 585 F.2d at 1312.

148. *Id.*

149. *Id.* at 1313.

150. *Id.* at 1314.

151. *Id.* at 1315.

152. 11 L. & N. Dec. 864 (1966).

In the absence of a definition, by statute or regulations, of acts which constitute a violation of nonimmigrant status, each case must be looked into on its own facts, and the decision arrived at should strike a fair balance between the character of the act committed and the consequences which will flow from it.¹⁵³

The court urged the Service in the future to follow its own recommendation that deportation statutes be liberally construed in favor of the alien.¹⁵⁴

DEPORTATION AND IMMIGRATION PROCEDURES

Public Law No. 95-549,¹⁵⁵ which became law on October 30, 1978, amends the INA to provide for the exclusion and deportation of all aliens who persecuted any person on the basis of race, religion, national origin, or political opinion, under the direction of the Nazi government of Germany or its allies.¹⁵⁶ The Act also removes the availability of voluntary departure under section 244 (e)¹⁵⁷ and precludes the withholding of deportation for persecution claims under section 243 (h).¹⁵⁸

The federal courts have recently decided two cases dealing with deportation procedures. In *United States v. Calderon-Medina*,¹⁵⁹ the Ninth Circuit Court of Appeals agreed with the INS that a defendant in a criminal prosecution for unauthorized reentry after deportation can collaterally attack the validity of the underlying deportation order.¹⁶⁰ However, the court reversed and remanded, holding that the INS' failure to notify a detained alien of his right to communicate with his country's diplomatic officers¹⁶¹ does not invalidate the underlying deportation order in the absence of a showing of prejudice to the alien.¹⁶²

The second case, *Gonzalez v. Vician*,¹⁶³ involved a native and citizen of the Dominican Republic who entered the United States at San Juan, Puerto Rico, in 1975 without a valid immigrant visa or other valid entry document. In December, 1975, she gave birth to an illegitimate son in New York. Petitioner was found to be de-

153. *Id.* at 865.

154. 585 F.2d at 1317.

155. 92 Stat. 2065 (1978).

156. [1978] U.S. CODE CONG. & AD. NEWS 4700.

157. 8 U.S.C.A. §§ 1182(a)(33), (d)(3), 1251(a)(19) (West Supp. 1979).

158. *Id.* §§ 1253(h), 1254(c).

159. 591 F.2d 529 (9th Cir. 1979).

160. *Id.* at 531.

161. 8 C.F.R. § 242.2(e) (1979). "Every detained alien shall be notified that he may communicate with the consular or diplomatic officers of the country of his nationality in the United States."

162. 591 F.2d at 529.

163. — F.Supp. —, No. 78 C 1749 (E.D.N.Y., filed Nov. 3, 1978), *digested in* 55 INTERPRETER RELEASES 518 (1978).

portable under sections 241(a)(1)¹⁶⁴ and 212(a)(20)¹⁶⁵ of the INA and was granted voluntary departure. Alleging that her son would suffer "irreparable loss" if she left the United States, the mother petitioned for an extension of voluntary departure, which was denied. She did not depart as directed and filed suit seeking a stay of deportation.¹⁶⁶

The District Court for the Eastern District of New York found for petitioner, holding that the rights of the citizen-child include the right not only to live in this country but also to be cared for by its natural mother. The court found petitioner worthy of protection because although she had entered the country illegally, she had at all times shown great concern for her son and attempted to preserve his rights as an American. In limiting this decision strictly to the facts of this case, the court did not provide a loophole for other immigrants.¹⁶⁷

The INS and the BIA have issued several significant decisions in the area of deportation procedures. In *In re Yuet Sun Lee*,¹⁶⁸ the INS set forth the standards to be followed in determining whether an alien should be allowed to reapply for admission after deportation under section 212. The court considered the following to be relevant: 1) applicant's moral character,¹⁶⁹ 2) recency of de-

164. 8 U.S.C. § 1251(a)(1) (1976). "Any alien in the United States shall upon order of the Attorney General, be deported who, (1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry. . . ."

165. *Id.* § 1182(a)(20) (1976).

Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:

(20) . . . any immigrant who at the time of application for admission is not in possession of a valid unexpired immigrant visa, reentry permit, border crossing identification card, or other valid entry document required by this chapter, and a valid unexpired passport, or other suitable travel document, or document of identity or nationality, if such document is required under the regulations issued by the Attorney General. . . .

166. 55 INTERPRETER RELEASES 518, 518 (1978).

167. *Id.* at 519. See *Jong Shik Choe v. INS*, 597 F.2d 168 (9th Cir. 1979).

168. I.D. No. —, File A-16027182 (filed Dec. 21, 1978), *digested in* 56 INTERPRETER RELEASES 10 (1979).

169. "A record of immigration violations, standing alone, will not conclusively support a finding of lack of good moral character. However, an evinced callous attitude toward violating the immigration laws without a hint of reformation of character should be considered as a heavily weighted adverse factor." 56 INTERPRETER RELEASES 10 (1979).

portation;¹⁷⁰ 3) need for alien services in the United States;¹⁷¹ 4) length of residence in the United States;¹⁷² and 5) hardship involved to himself and others.¹⁷³ The Commissioner indicated that in applying these factors, any doubt should be resolved in favor of the alien. Congress developed sections 212(a)(16) and (17)¹⁷⁴ to provide remedial relief, and they should not be construed as punitive.¹⁷⁵

In *In re Garcia*,¹⁷⁶ the BIA clarified a recent decision, *In re Kotte*,¹⁷⁷ and set forth the general proposition that when a visa petition and adjustment application are simultaneously filed, deportation proceedings should be continued pending adjudication of the visa petition.¹⁷⁸ In *Garcia*, an immigration judge found the respondent deportable as an overstayed visitor under section 241(a)(2) of the INA.¹⁷⁹ The judge denied suspension of deportation and granted voluntary departure. Respondent's appeal was dismissed by the BIA.¹⁸⁰ Thereafter, respondent's wife, a citizen, filed a visa petition in an effort to accord him immediate relative status under section 201(b).¹⁸¹ Respondent simultaneously filed an application for adjustment of status under section 245.¹⁸² Treating the adjustment application as a motion to reopen the deportation proceedings,¹⁸³ the District Director transmitted the unadjudicated visa petition and adjustment application to the BIA with the administrative record. The BIA granted the motion to reopen and remanded the record to the immigration judge for fur-

170. Ordinarily when the cause for deportation has been removed and the alien appears eligible for a visa, the recency of the deportation should not be considered . . . when there is a finding of poor moral character, based on moral turpitude in conduct . . . which evinces a callous conscience. In such circumstances, there must be a measurable reformation of character over a period of time, to properly assess the alien's ability to integrate into society.

Id.

171. "Where the alien will provide services to the public in a job category where sufficient workers in the United States are not available, this is a favorable factor in his behalf." *Id.*

172. "This is a favorable factor only where the residence is pursuant to a lawful admission or adjustment of status as a permanent resident." *Id.*

173. Consideration should be given to applicant's family and hardship which may result to them if permission to reapply is not granted. See *In re Tin*, 14 I. & N. Dec. 371 (1973); *In re Chin*, 14 I. & N. Dec. 357 (1973).

174. 8 U.S.C. § 1182(a)(16), (17) (1976).

175. 56 INTERPRETER RELEASES 11 (1979).

176. I.D. No. 2684 (1978).

177. I.D. No. 2634 (1978).

178. I.D. No. 2684 (1978).

179. 8 U.S.C. § 1251(a)(2) (1976).

180. I.D. No. 2684, at 2.

181. 8 U.S.C. § 1151(b) (1976).

182. *Id.* § 1255.

183. 8 C.F.R. § 242.22 (1979).

ther proceedings.¹⁸⁴ In the earlier case of *In re Kotte*,¹⁸⁵ the BIA had held that an immigration judge is not required to continue a deportation hearing pending adjudication by the District Director of the visa petition.¹⁸⁶ In reexamining its position in light of amendment to the regulation¹⁸⁷ to permit simultaneous filing of both visa petition and adjustment application, the BIA concluded: "In order to give what we consider to be appropriate effect to the simultaneous filing provisions of 8 C.F.R. § 245.2(a)(2), as amended, we shall hereafter generally reopen the deportation proceedings in such cases unless clear ineligibility is apparent in the record."¹⁸⁸

The BIA was careful, however, to qualify its decision and cautioned that no inflexible rule was intended. An immigration judge could still summarily deny a request for continuance or motion to reopen if he determined that the visa petition was frivolous or that the adjustment application would be denied on statutory grounds or in the exercise of discretion, even if the visa petition were approved.¹⁸⁹

In *In re Mendel*,¹⁹⁰ a case of first impression, the INS held that an alien who has not engaged in proscribed employment since his last entry, but who on a previous stay engaged in unauthorized employment, is barred from adjustment of status by section 245(c) of the INA.¹⁹¹ The Commissioner held that even though the alien had departed from the United States since his unauthorized employment, his departure and subsequent return were not sufficient to "wipe the slate clean" with respect to eligibility for adjustment of status under section 245.¹⁹²

The BIA, in *In re Cheung*,¹⁹³ overruled *In re S-Y-L*,¹⁹⁴ which

184. I.D. No. 2684, at 7 (1978).

185. I.D. No. 2634 (1978).

186. *Id.* at 5.

187. 8 C.F.R. § 245.2(a)(2) (1979).

188. I.D. No. 2684, at 3 (1978).

189. *Id.* at 6.

190. No. —, File A-22289884 (filed May 4, 1979), *digested in* 56 INTERPRETER RELEASES 262 (1979).

191. 8 U.S.C. § 1255(c) (1976). "The provisions of this section (adjustment of status) shall not be applicable to . . . an alien . . . who hereafter continues in or accepts unauthorized employment prior to filing an application for adjustment of status. . . ."

192. 56 INTERPRETER RELEASES 263 (1979).

193. I.D. No. 2693 (1979).

194. 9 I. & N. Dec. 575 (1962).

designated the Nationalist Government of the Republic of China or Taiwan as appropriate for deportation purposes.¹⁹⁵ The BIA based this action on the recent recognition by the United States of the People's Republic of China as the sole legal government of China. Most Chinese aliens in the United States are from Taiwan or refugees from the mainland. This action will probably result in an increase in claims for asylum from Chinese who are found deportable.

REFUGEES AND ASYLUM

An area of immigration law which has been the subject of increased interest and recent publicity is the rules and regulations controlling the flow of refugees and claims for asylum. With the recent revolution in Iran and the much publicized plight of the "Boat People" of Indochina, changes in the treatment of refugees will be a continuous process.¹⁹⁶

In an action effective March 6, 1979, the INS issued amended regulations relating to the adjustment of status for certain aliens paroled into the United States.¹⁹⁷ The first amendment to the regulations enables an alien, paroled into the United States as a refugee prior to September 30, 1980, to adjust his status to that of a permanent resident after residing in this country for two years.¹⁹⁸ Prior regulations did not provide for adjustment of status for refugees, although they did allow a "conditional entrant" to adjust status after two years residence but only to a classification where a visa number was available.¹⁹⁹

The second amendment to the regulations permits certain aliens to have their date of permanent residence rolled back to the date of parole into the United States. These aliens must have been paroled in as refugees prior to September 30, 1980, and must have acquired status as lawful permanent residents under some other provision of law.²⁰⁰ This provision would allow a permanent resident to qualify for naturalization two years sooner.

The INS has also issued regulations, effective May 10, 1979, governing the processing and adjudication of asylum claims in both

195. I.D. No. 2693 (1979).

196. See H.R. 2816, 96th Cong., 1st Sess., 125 CONG. REC. 1326 (1979); H.R. 3610, 96th Cong., 1st Sess., 125 CONG. REC. 2243 (1979); H.R. 4633, 96th Cong., 1st Sess., 125 CONG. REC. 5278 (1979); S. 643, 96th Cong., 1st Sess., 125 CONG. REC. 2630 (1979). All are proposals to modify the treatment of refugees under the immigration laws.

197. 44 Fed. Reg. 12,157 (1979).

198. *Id.*

199. 8 C.F.R. § 235.9(c) (1978).

200. 44 Fed. Reg. 12,157 (1979).

exclusion and deportation proceedings.²⁰¹ In exclusion proceedings, the District Director will retain jurisdiction over asylum claims submitted by only three classes of applicants at seaports or airports: crewmen, stowaways, and aliens temporarily excluded under section 235 of the INA.²⁰² All other claims submitted by aliens not yet admitted to the United States will be heard and determined by immigration judges.²⁰³

In deportation proceedings, the District Director retains jurisdiction over asylum claims in only two categories: aliens who are within the United States and maintaining a lawful status and aliens whose presence in the United States is authorized by the INS. Once deportation proceedings begin, an asylum request will be considered an application for withholding of deportation and will be heard and adjudicated by an immigration judge.²⁰⁴ In both exclusion and deportation proceedings, the asylum claim and supporting evidence will be submitted to the State Department's Office of Refugee and Migration Affairs for its views. The hearing will be deferred for not more than thirty days pending receipt of the State Department's response.²⁰⁵

Legislation has been proposed in both Houses of Congress which would increase the number of refugees entering the United States.²⁰⁶ The proposals, initiated by the Administration, would eliminate the seventh preference category. New provisions would be added for refugees, including a new definition of refugee status conforming to the United Nations Protocol.²⁰⁷ The worldwide ceiling, exclusive of refugees, would be set at 270,000 annually. The six percent formerly allocated to seventh preference would be ad-

201. *Id.* at 21,253-59 (1979).

202. 8 U.S.C. § 1225 (1976). This section provides for detention by immigration officers for inspection.

203. 44 Fed. Reg. 21,258 (1978).

204. *Id.*

205. *Id.* at 21,259 (1979).

206. S. 643, 96th Cong., 1st Sess., 125 CONG. REC. 2630 (1979), H.R. 2816, 96th Cong., 1st Sess., 125 CONG. REC. 1326 (1979).

207. The term refugee means any person who is outside any country of his nationality, or in the case of a person having no nationality, is outside any country in which he last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself of the protection of, that country because of persecution or a well founded fear of persecution on account of race, religion, nationality, membership of a particular social group, or political opinion.

S. 643, 96th Cong., 1st Sess., 125 CONG. REC. 2631 (daily ed. Mar. 13, 1979).

ded to second preference. "Normal flow" refugees²⁰⁸ would be allowed a maximum of 50,000 places annually. Refugees would be exempt from LPC and labor certification requirements and would be admitted as immigrants. A maximum of 5,000 slots would be available for adjustment of status by refugees physically present in the United States for at least two years. In addition, the Attorney General would be authorized, upon Presidential determination, to admit conditionally to the United States an unlimited number of "emerging situation" refugees.²⁰⁹ An amendment to section 243(h) would authorize withholding deportation of an alien to any country where the alien's life or freedom would be threatened on account of his race, religion, nationality, or membership in a particular social group or political opinion. The language in existing section 243(h) referring to an alien "within the United States" is omitted from the Administration's bill. Presumably this would extend its reach to alien parolees or applicants for admission.²¹⁰

In an important asylum case, *Chen Chaun-Fa v. Kiley*,²¹¹ the District Court for the Southern District of New York held that neither section 279 of the INA²¹² nor 28 U.S.C. § 1331²¹³ confers jurisdiction on the district courts to review denial of an asylum application under 8 C.F.R. § 108.²¹⁴ The court, noting that the INA confers only limited jurisdiction on the district courts, stated that "the district courts of the United States shall have jurisdiction of all causes, civil and criminal, arising under any of the provisions of this subchapter."²¹⁵ Because this section appears in subchapter II of the INA, the jurisdiction of the district courts is limited to claims arising under subchapter II. Because the statutory basis of the asylum claims was contained in the first subchapter of the Act, the court dismissed the complaint for lack of subject matter jurisdiction.²¹⁶

208. The number of refugees that would normally be expected to enter the United States in a year. *Id.*

209. Refugees in excess of the "normal flow" number, seeking to enter the United States because of an unforeseen circumstance such as war, revolution, or natural disaster. *Id.*

210. 56 INTERPRETER RELEASES 288-89 (1979). Alien parolees and applicants for admission are not technically within the United States for purposes of the immigration laws. However, the Administration's Refugee Bill does not make this technical distinction and would apply to these groups.

211. 459 F. Supp. 762 (S.D.N.Y. 1979).

212. 8 U.S.C. § 1329 (1976).

213. Amount in controversy requirement for federal jurisdiction.

214. 459 F. Supp. at 764.

215. *Id.* (quoting 8 U.S.C. § 1329 (1976)).

216. 459 F. Supp. at 764.

CONCLUSION

The changes in the immigration laws during the past year have been so extensive and varied that it is difficult to identify a direction in the entire body of law. Specific areas of the immigration laws, however, evidence definite trends. Two areas, the laws regulating the employment of aliens and the laws controlling the treatment of refugees and claims for asylum, should prove to be interesting.

In the regulation of the employment of aliens, Congress is attempting to make it more difficult to employ illegal workers. Proposed legislation seeks to impose criminal penalties on the employers of illegal aliens and deny those employers the income tax deduction for wages paid to illegal workers. In the control of refugees and asylum claims, the trend is toward a liberalization of the laws. The Administration's Refugee Bill will not only admit more refugees, it will give the refugees immigrant status. This is a marked change from the current position of refugees, which is one of nonstatus.

These two areas of the immigration laws are also unique because more than any other they are heavily influenced by outside interests. World opinion has already had a dramatic affect on United States policy toward refugees and will probably continue to do so, as long as the "Boat People" or similar groups exist. Policies regulating the entry of aliens for employment, especially from Mexico, will be guided by United States desires to become closely allied with that country's government. Thus, an understanding of the world situation is helpful in analyzing changes in the immigration laws.

The immigration laws of the United States are constantly undergoing change. Although the constant changes make it difficult to keep current, it is hoped that this Comment will provide a starting point in researching current issues dealing with immigration in the United States.

ANTHONY J. PASSANTE, JR.

